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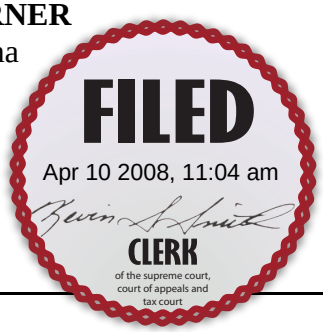

IN THE
COURT OF APPEALS OF INDIANA

IN RE THE GUARDIANSHIP OF D.D.	)	
	)	
JEANNE DALE FREEMAN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 62A05-0709-JV-516
	)	
PERRY COUNTY DEPARTMENT OF CHILD SERVICES,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable Jonathan J. Parkhurst, Magistrate
The Honorable Lucy Goffinet, Judge
Cause No. 62C01-0704-GU-9

April 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Jeanne Dale Freeman (Freeman), appeals the trial court's denial of her petition for guardianship of her nephew, D.D.

We affirm.

ISSUES

Freeman raises several issues on appeal, which we restate as:

(1) Whether the trial court admitted inadmissible hearsay into evidence at the final hearing, thereby abusing its discretion;

(2) Whether the trial court abused its discretion by denying Freeman's petition for guardianship; and

(3) Whether the trial court abused its discretion by denying Freeman's motion to correct error.

FACTS AND PROCEDURAL HISTORY

D.D. was born on June 5, 2001, to Tyra Preston (Preston) and Charles Dale (Dale). Dale died in November 2003, leaving D.D. with Preston and Preston's three older children from a previous relationship. However, Freeman—Dale's sister and D.D.'s aunt—has had physical custody of D.D. for certain periods throughout his life because of Preston's problems with drugs. In December 2004, Preston turned D.D. over to Freeman pursuant to the terms of an informal adjustment with the Perry County Department of Child Services (PCDCS). D.D. was returned to Preston's custody in January 2005, but then went back to Freeman in August 2005 when Preston was charged with several drug-related offenses in Kentucky. At some point in 2005, Freeman filed a petition for guardianship of D.D. The

Perry Circuit Court held a hearing on that petition in February 2006. In June 2006, while that petition was still pending, Preston regained custody of D.D., and on November 2, 2006, the trial court denied Freeman's petition, citing the preference for placement with natural parents.

Just four days later, on November 6, 2006, the PCDCS requested an emergency custody order for D.D. and his half-siblings, alleging that Preston had failed two drugs tests. The trial court granted the order, and the children were placed with Jerry and Melissa Craig (the Craigs). The PCDCS also filed a petition alleging D.D. to be a child in need of services (CHINS). On November 21, 2006, Preston admitted, and the trial court found, that D.D. was a CHINS. Eventually, Freeman and Rita Dale—D.D.'s paternal grandmother and Freeman's mother—were allowed to intervene in the CHINS proceeding. On January 3, 2007, Freeman filed a Motion for Kinship Placement. In order to be considered as a candidate for out-of-home placement in the CHINS proceeding, both Freeman and her husband, James, were required to submit to a criminal history check with the Indiana Department of Child Services (State DCS). *See* Ind. Code § 31-34-4-2(c).[1]

Several relevant events took place in April 2007, while the CHINS proceeding was still on-going. First, on April 10, 2007, Freeman filed a second petition for guardianship of

[1] Indiana Code § 31-34-4-2(c) states, in pertinent part:

> [B]efore placing a child in need of services in an out-of-home placement, including placement with a blood or an adoptive relative caretaker, a de facto custodian, or a stepparent, the court shall order the department to conduct a criminal history check of each person who is currently residing in the location designated as the out-of-home placement.

D.D. Next, on April 16, 2007, Preston was sentenced to five years in prison based on the drug charges in Kentucky. Finally, on April 17, 2007, the Central Office Background Check Unit of the State DCS conditionally disqualified James Freeman as a candidate for out-of-home placement in the CHINS proceeding based upon his criminal history. At some point, James requested a waiver of his status from the State DCS. However, that request was still undecided as of June 7, 2007, the date of the final hearing on Freeman's second petition for guardianship.

At that final hearing, Renea Ryan (Ryan), D.D.'s primary therapist, testified that Freeman should not be appointed as D.D.'s guardian, in part because D.D. is "extremely bonded to his siblings" and "has demonstrated on multiple occasions [a] high level of anxiety and fears" when he discussed his extended paternal family, including Freeman. (Tr. pp. 25-27). Ryan also testified regarding an incident where D.D. said he would make sure that Rita Dale "can't get me." (Tr. p. 29). Freeman lodged a hearsay objection, and counsel for the PCDCS responded, "Your Honor as Miss Ryan is giving her opinion in this case I think it's necessary for her to state what the child has stated to her because that what she is basing her opinion on." (Tr. p. 29). The trial court stated, "As such I'm going to overrule the objection." (Tr. p. 29).

Barbara VanLandingham (VanLandingham), D.D.'s guardian *ad litem*, testified that Freeman should not be appointed as D.D.'s guardian because "it[']s in the best interest of [D.D.] to stay with his siblings." (Tr. p. 39). In support of her opinion, VanLandingham testified regarding an incident where D.D. said that he would prefer to live with his brothers and sister. Freeman lodged another hearsay objection, and the trial court again overruled it.

Christina Stiles (Stiles), D.D.'s case worker from the PCDCS, was asked whether Freeman should be appointed as D.D.'s guardian, and she replied, "I don't think that that should happen at all." (Tr. p. 49). In support, Stiles cited D.D.'s strong bond with his siblings, especially with his older brother, and James Freeman's criminal background.

At the end of the hearing, the trial court denied Freeman's petition, stating:

> [T]here is no clear and convincing evidence presented which reveals the existence of a compelling[, real] and permanent interest of [D.D.] that would indicate that he's best served by appointing [Freeman] guardian over his person. I don't believe it[']s in the best interest of [D.D.] to be removed from his siblings. Nor is it in the best interest of [D.D.] to be placed in the home of [Freeman] especially given the background, character and criminal history of her husband.

(Tr. p. 65). On June 25, 2007, the trial court issued a written order reaffirming its oral denial of Freeman's petition, finding that (1) there was no clear and convincing evidence presented that it is in the best interest of D.D. for Freeman to be appointed guardian over his person and (2) it is not in the best interest of D.D. to be removed from his siblings.

On July 9, 2007, the State DCS granted the waiver that James Freeman had requested for purposes of the CHINS proceeding. Specifically, the State DCS stated that James' "criminal history status is qualified by waiver." (Appellant's App. p. 13). The granting of the DCS waiver prompted Freeman to file, on July 24, 2007, a motion to correct error, alleging, in part, that the waiver constituted "new material evidence." (Appellant's App. p. 10). On August 8, 2007, the trial court denied Freeman's motion to correct error.

Freeman now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Freeman argues that: (1) the trial court admitted inadmissible hearsay into evidence at the final hearing, thereby abusing its discretion; (2) the trial court abused its discretion by denying her petition for guardianship; and (3) the trial court abused its discretion by denying her motion to correct error.

I. *Hearsay*

Freeman asserts that the trial court admitted inadmissible hearsay into evidence at the final hearing, thereby abusing its discretion. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is not admissible unless it fits within some exception to the hearsay rule. *Simmons v. State*, 760 N.E.2d 1154, 1159 (Ind. Ct. App. 2002). A trial court has broad discretion in ruling on the admissibility of evidence. *Fentress v. State*, 863 N.E.2d 420, 422-23 (Ind. Ct. App. 2007). Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abuses its discretion. *Id*. at 423. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*.

Freeman directs us to two instances of alleged hearsay: Ryan's testimony regarding the incident where D.D. said he would make sure that Rita Dale, his paternal grandmother and Freeman's mother, "can't get me," (Tr. p. 29), and VanLandingham's testimony regarding D.D.'s statement that he would prefer to stay with his half-siblings. On appeal, Freeman contends that the trial court abused its discretion in overruling her objections and

admitting the testimony because D.D.'s statements were offered to prove the truth of the matters asserted. We disagree.

As counsel for the PCDCS argued and the trial court agreed, D.D.'s statements were offered to show how Ryan and VanLandingham formed their opinions regarding Freeman's proposed guardianship; they were not offered to prove the truth of the matters asserted by D.D. By definition, then, they were not hearsay. Furthermore, to the extent, if any, that the PCDCS hoped that the trial court would consider D.D.'s statements for the truth of the matters asserted, we presume that the trial court limited its consideration of the evidence to proper purposes. *See Randles v. Indiana Patient's Compensation Fund*, 860 N.E.2d 1212, 1232 n.9 (Ind. Ct. App. 2007) ("When a case is tried to the bench, we presume that the court ignored inadmissible evidence in reaching its judgment."), *reh'g denied, trans. denied*. The trial court did not abuse its discretion by allowing Ryan and VanLandingham to testify as to D.D.'s out-of-court statements.

II. *Denial of Guardianship*

Freeman also argues that the trial court's denial of her petition for guardianship "was contrary to the law and the evidence." (Appellant's Br. p. 6). All findings and orders of the trial court in guardianship proceedings are within the trial court's discretion. *In re Guardianship of J.K.*, 862 N.E.2d 686, 690 (Ind. Ct. App. 2007) (citing Ind. Code § 29-3-2-4). Thus, we will review such findings and orders under an abuse of discretion standard. *Id*. We give due regard to the trial court's ability to assess the credibility of witnesses, and we do not reweigh the evidence. *Id*. at 690-91. Rather, we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. *Id*. at 691.

Any person may file a petition for the appointment of a person to serve as guardian for a minor. I.C. § 29-3-5-1. Indiana Code § 29-3-5-3(a) provides:

> Except under subsection (c), if it is alleged and the court finds that:
>
> (1) the individual for whom the guardian is sought is an incapacitated person or a minor; and
>
> (2) the appointment of *a guardian* is *necessary* as a means of providing care and supervision of the physical person or property of the incapacitated person or minor;
>
> the court shall appoint *a guardian* under this chapter.

(Emphases added). In turn, subsection (c) provides:

> If the court finds that it is *not in the best interests of the incapacitated person or minor* to appoint *a guardian*, the court may:
>
> (1) treat the petition as one for a protective order and proceed accordingly;
>
> (2) enter any other appropriate order; or
>
> (3) dismiss the proceedings.

(Emphases added). This court has suggested that under this provision, "it is conceivable that a trial court might find the appointment of a guardian to be necessary, but not in the best interests of the minor." *Hinkley v. Chapman*, 817 N.E.2d 1288, 1293 (Ind. Ct. App. 2004). We believe some clarification is in order.

A trial court could reasonably find that while the appointment of *a* guardian is necessary, the appointment of *a particular person* as that guardian is not in the best interests of the minor. On the other hand, a trial court finding that the appointment of *a* guardian is necessary but that the appointment of *a* guardian is not in the best interests of the minor, though certainly conceivable, would be nonsensical. For purposes of Indiana Code § 29-3-5-3(a), we have defined "necessary" as "absolutely essential." *Id*. at 1291. We wonder: how could the appointment of *a* guardian be "absolutely essential" to a child's well being but not

in the child's best interests? Stated in the affirmative, if the appointment of *a* guardian is necessary, it is, by definition, in the minor's best interests. To the extent that the language of Indiana Code § 29-3-5-3 suggests otherwise, this is simply a case of unfortunate legislative drafting.

Here, the evidence supports the trial court's conclusion that the appointment of Freeman as D.D.'s guardian is not in D.D.'s best interests and therefore not necessary. Again, we must consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. *In re Guardianship of J.K.*, 862 N.E.2d at 691. In her brief, Freeman cited only evidence in her favor and simply ignored the evidence favoring the trial court's judgment. That evidence is significant. All of the witnesses who had worked directly with D.D.—Ryan, VanLandingham, and Stiles—opined that Freeman should not be appointed as D.D.'s guardian. These witnesses cited various reasons for their opinions: D.D.'s strong bond with his siblings, especially his older brother; the high level of anxiety and fear he experiences when discussing his extended paternal family, including Freeman; and James Freeman's criminal background. In light of this overwhelming evidence, we conclude that the trial court did not abuse its discretion in denying Freeman's guardianship petition.

III. *Denial of Motion to Correct Error*

Finally, Freeman contends that the trial court should have granted her motion to correct error based upon newly discovered evidence. "The trial court has discretion to grant or deny a motion to correct error, and we reverse the trial court's decision only for an abuse of that discretion." *James v. State*, 872 N.E.2d 669, 671 (Ind. Ct. App. 2007). Such an abuse occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Id.*

Here, the "newly discovered evidence" relied upon by Freeman in her motion to correct error is the waiver granted by the DCS to her husband James on July 9, 2007, more than a month after the final hearing on June 7, 2007. Freeman notes that the trial court relied in part on James' criminal history in denying the guardianship petition and argues that the DCS waiver "completely nullifies this line of reasoning[.]" (Appellant's Br. p. 12). There are two problems with Freeman's argument.

First, as a procedural matter, "[a]lthough newly discovered evidence is a basis for a motion to correct error under Ind. Trial Rule 59, 'facts not in existence at the time of trial do not constitute a ground for a new trial because of newly discovered evidence.'" *In re Guardianship of J.K.*, 862 N.E.2d at 693 n.3 (quoting *Styck v. Karnes*, 462 N.E.2d 1327, 1331 (Ind. Ct. App. 1984)). As noted above, the fact of James' DCS waiver did not exist at the time of the final hearing. Therefore, it does not constitute "newly discovered evidence" for purposes of Trial Rule 59.

Second, in order to obtain relief based on newly discovered evidence pursuant to Trial

Rule 59, the movant must show, among other things, that the new evidence will probably produce a different result. *Hawkins v. Cannon*, 826 N.E.2d 658, 663 (Ind. Ct. App. 2005), *trans. denied*. Freeman has not convinced us that James' DCS waiver would lead the trial court to reach a different result. The DCS waiver merely allows James to be considered as a candidate to provide temporary out-of-home placement under the CHINS statutes. *See* Ind. Code § 31-34-4-2(d) (disqualifying people with certain criminal backgrounds from being considered as candidates to provide temporary out-of-home placement for children in need of services). Freeman points to nothing to suggest that such a waiver prevents a trial court from considering a person's criminal history for purposes of a guardianship proceeding. The waiver does not mean that James' convictions have been reversed or that he has been pardoned. James still has a criminal history, a fact that clearly worried the trial court. Furthermore, other evidence supported the trial court's denial of Freeman's petition, including D.D.'s bond with his half-siblings and the fear and anxiety he experienced when discussing his extended paternal family.

In sum, we cannot say that the trial court abused its discretion in denying Freeman's motion to correct error.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion by admitting D.D.'s out-of-court statements into evidence, by denying Freeman's petition for guardianship, or by denying Freeman's motion to correct error.

Affirmed.

KIRSCH, J., and MAY, J., concur.